

13 April 2010

Cartel Criminalisation
Ministry of Economic Development
PO Box 1473
WELLINGTON 6140

Email: cartels@med.govt.nz

Dear Sir/Madam

Re: Cartel Criminalisation Discussion Document

Introduction

I am writing to you regarding the discussion document released for submitters to comment on entitled *Cartel Criminalisation*. While the document asks a series of questions, Business New Zealand wishes to highlight some fundamental issues that we believe should also be examined before action (if any) is taken.

First, Business New Zealand would like to point out that we support competition law that provides for an effective and efficient market. We also support moves by the Government that eliminate clear cases of hard core cartel behaviour. However, the processes by which recommendations have been formulated in this instance have been built on very weak foundations. Simply put, this document resembles a solution looking for a problem.

Proper Regulatory Process

Business New Zealand believes any changes to regulatory processes must be predicated on a proper and full review. In this regard, we have repeatedly outlined to government the importance of proper processes when looking to introduce or amend existing regulations.

Before any regulatory approach is considered desirable, it is first important to fully understand the nature of the problem, who is affected, the costs of taking action, and who bears those costs. Regulatory intervention, because of its cost, should generally be considered as a last resort, only to be engaged in when all other cost effective approaches have been exhausted. In order to justify government intervention, there must be a clear case of market failure and the problem of market failure must be significant.

Given that markets are generally faster at self-correcting than governments are at intervening, the onus of proof must be on government to prove beyond reasonable doubt that the benefits of intervention exceed the costs, including unintended costs associated with regulation (such as non-compliance).

Moreover, it should be noted that regulators generally have strong incentives to minimise their own risk by imposing higher standards than might arguably be justified. Because regulators do not bear the costs associated with their decisions (costs will ultimately fall on consumers), they may well “over-regulate” rather than take account of, or adequately consider, the cost/quality trade-offs consumers are willing to make.

Main Deficiencies of the Discussion Document

While the Document asks a series of questions relating to detecting and deterring cartels, defining the offence, and criminal procedures and penalties, it makes little attempt to establish the extent of the problem of hard-core cartel behaviour in New Zealand. Given the discussion document is 98 pages in length, there is not a single recent New Zealand case study outlining hard-core cartel behaviour. Not only that, but there is absolutely no attempt to provide a timeline of past behaviour showing that such behaviour is becoming an increasing issue warranting attention in the first place.

Even if examples were provided, this should not automatically mean that action needs to be taken. Instances of hard core cartel behaviour may be sparse, and have little effect on the economy. If the evidence shows significant market failure regarding cartel behaviour in New Zealand, then we would support the investigation of strong penalties, but without any idea of the extent of the problem, it is extremely difficult to support any of the options for change outlined in the document.

New Zealand’s alignment with offshore treatment has also been stated as a major factor in wanting to introduce these changes. In particular, the Single Economic Market agenda with Australia is considered an important influence. While we believe it is important to understand offshore regulatory processes and how New Zealand fits in with these, we also urge caution that any alignment with other countries should only take place if there is a significant net benefit to the New Zealand economy. Otherwise, we would be introducing regulatory regimes that in many instances would create a net cost and hamper any competitive advantages the country might have in the regulatory field.

We also note that the Ministry released an occasional paper entitled ‘*Criminalisation of Cartel Behaviour*’. While we understand the views, opinions, findings and conclusions and recommendations expressed in it are strictly those of the author and do not necessarily reflect the views of MED, again there is no attempt to provide analysis involving the extent of the problem in New Zealand. Both documents represent the expenditure of a sizeable amount of time and resources without addressing what should be standard regulatory investigation processes.

Overall, given our concerns we strongly disagree with the statement on page 8 that *'the substantive regulatory impact assessment elements (problem, options and impacts of those options) have been included in the text of the discussion document'*.

Last, in addition to the document, comments from the Minister and others appear to reflect the view that proposed changes are a *fait accompli*, which we believe would undermine the purpose of the document which is or should be to gauge views from the public and make regulatory changes accordingly. Given these considerable problems, Business New Zealand recommends that the Government makes no changes to existing competition laws involving cartels, until such time as another investigation taking into account our concerns has been conducted.

Recommendation: The Government makes no changes to existing competition laws involving cartels, until such time as another investigation taking into account Business New Zealand's concerns has been conducted.

We again thank you for the opportunity to comment.

Regards,

A handwritten signature in black ink, appearing to be 'PO'Reilly', written in a cursive style.

Phil O'Reilly
Chief Executive
Business New Zealand